PD-0027-21
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 4/30/2021 12:26 PM
Accepted 5/3/2021 10:32 AM
DEANA WILLIAMSON
CLERK

No. PD-0027-21

In the Court of Criminal Appeals

FILED
COURT OF CRIMINAL APPEALS
5/3/2021
DEANA WILLIAMSON, CLERK

No. 14-19-00154-CR
In the Court of Appeals for the Fourteenth Judicial District of Texas at Houston

No. 1527611
In the 208th District Court of Harris County, Texas

STATE OF TEXAS
v.
JOHN WESLEY BALDWIN

STATE'S BRIEF ON REVIEW

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Presiding Judge:

Hon. Denise Collins — Judge presiding at initial hearing

Hon. Greg Glass — Judge presiding in subsequent matters

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STATEMENT OF THE CASE

The appellee was indicted for the offense of capital murder. (C.R. – 10). The appellee filed a motion to suppress evidence obtained from his cellular telephone, his statements, and testimony about that evidence and those statements. (C.R. – 66-73). Following a hearing on the appellee's motion, the Honorable Denise Collins, presiding judge of the 208th District Court, found that the facts set out in the affidavit were insufficient to establish probable cause that the appellee's phone would contain evidence of the capital murder. (II R.R. – 17-18).

Judge Collins orally granted the appellee's motion to suppress the evidence obtained from his phone. (II R.R. – 18). The Honorable Greg Glass, the newly-elected presiding judge of the 208th District Court, later issued a written order granting the appellee's motion to suppress in its entirety. (C.R. – 88-96).[1] The State timely filed its notice of appeal from the trial court's order. (C.R. – 97-99); TEX. CODE CRIM. PROC. art. 44.01.

A panel of the court of appeals issued an opinion in this case reversing the ruling of the trial court on August 6, 2020. *State v. Baldwin*, No. 14-19-00154-CR, ___ S.W.3d ___ (Tex. App.—Houston [14th Dist.] Aug. 6, 2020, op. withdrawn on reh'g). The court of appeals subsequently granted a motion for *en banc*

reconsideration timely-filed by the appellee and withdrew the panel opinion, affirming the decision of the trial court with regard to the sufficiency of the at-issue search warrant affidavit. *State v. Baldwin*, No. 14-19-00154-CR, ___ S.W.3d ___ (Tex. App.—Houston [14th Dist.] Dec. 10, 2020, no pet. h.). On January 20, 2021, the State timely filed a petition for discretionary review, which was granted by this Court on March 31, 2021. *See* TEX. R. APP. P. 68.2. The State therefore files this brief on review, which is due today, April 30, 2021.

[1] Glass later clarified that his intent was to endorse Collins's earlier ruling. (Supp. C.R. – 3).

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On September 23, 2016, Deputy Casey Parker, an investigator assigned to the Homicide Division of the Harris County Sheriff's Office (HCSO), applied for a search warrant for a Samsung Galaxy5 cellular telephone. (State's Ex. 4). In her sworn affidavit, Parker set out the following facts:

Parker investigated the robbery and murder of the complainant, Adrianus Kasuma, which occurred at his home around 8:40 p.m. on September 18, 2016. (State's Ex. 4). Sebastianus Kasuma, the complainant's brother, was present during the capital murder. (State's Ex. 4). Sebastianus heard a loud banging noise and, when he went to investigate the sound, an armed, masked black male confronted him. (State's Ex. 4). The masked gunman demanded money from him and then assaulted him with his fists and a gun. (State's Ex. 4).

While Sebastianus was fighting with the gunman, he heard a gunshot from the kitchen area of the residence. (State's Ex. 4). He turned and saw a second masked black male run from the back of the residence. (State's Ex. 4). The two suspects grabbed a box of receipts and money from the Kusumas' family business and fled through the front door. (State's Ex. 4).

Sebastianus followed them and observed them get into a white, four-door sedan and flee the scene. (State's Ex. 4). When he returned to the house, he found

Adrianus lying on the kitchen floor near the back door. (State's Ex. 4). Adrianus had a gunshot wound to his chest and was unresponsive. (State's Ex. 4).

The complainant's neighborhood consisted of a single, circling boulevard with multiple small cul-de-sacs branching off of it. (State's Ex. 4). The neighborhood was only accessible to motor vehicles from a single entrance. (State's Ex. 4).

On Saturday, September 17, 2016—the day before the murder—another citizen observed a white, four-door Lexus bearing Texas license plate number GTK-6426 and occupied by two black males repeatedly circling the neighborhood and the complainant's residence. (State's Ex. 4). The citizen found that vehicle so suspicious that she photographed it and captured its license plate number. (State's Ex. 4).

At dusk on the day of the offense, a citizen who lived about two-and-a-half blocks from the complainant's house observed a white Lexus GS300 driven by a large black male pass by his residence three times. (State's Ex. 4).[2] Shortly after the Lexus passed the citizen's residence the third time, the citizen heard the emergency vehicles' sirens. (State's Ex. 4).

[2] Parker used the work "duck" rather than "dusk" in her affidavit. (State's Ex. 4). The magistrate—like the trial judge—could have reasonably concluded that this was a misspelling. (II R.R. – 14).

At about 8:45 p.m., a citizen who lived near the entrance of the neighborhood observed a white, four-door sedan exit the neighborhood at a high rate of speed. (State's Ex. 4). Within minutes, the citizen observed emergency vehicles enter the neighborhood. (State's Ex. 4).

A video system at a residence only five houses north of the complainant's home confirmed that a white, four-door vehicle, similar in appearance to the white Lexus registered under license plate GTK-6426, had been in the neighborhood the day before and the day of the capital murder. (State's Ex. 4).[3] On Saturday, September 17, 2016, the video system captured an image of the vehicle at 2:03 PM. (State's Ex. 4). On Sunday, September 18, 2016, the day of the murder, the video system captured images of the vehicle at 8:15 p.m., 8:16 p.m., and 8:23 p.m. (State's Ex. 4). At 8:23 p.m., the vehicle paused before leaving the view of the camera. (State's Ex. 4). The capital murder occurred within the next fifteen minutes. (State's Ex. 4).

[3] In her affidavit, Parker stated that the video system captured images of the vehicle "circling the neighborhood on Saturday, September 17, 2016 and Sunday, September 18, 2016." (State's Ex. 4). In specifying the dates and times that the video system captured images of the vehicle, she mistakenly identified the dates as "Saturday, September 18, 2016," and "Sunday, September 19, 2016." (State's Ex. 4). But in two other sentences in the affidavit, she correctly identified September 17, 2016 as a Saturday and September 18, 2016 as a Sunday. (State's Ex. 4). From the face of the affidavit, the magistrate therefore could have properly concluded—as did the trial court—that the incorrect dates were merely typographical errors. (II R.R. – 13–14); *see Green v. State*, 799 S.W.2d 756, 759 (Tex. Crim. App. 1990) (holding that purely technical or clerical discrepancies in dates or times do not automatically invalidate search or arrest warrants).

On September 22, 2016, four days after the offense, patrol deputies stopped the vehicle bearing Texas license plate GTK-6426 for traffic violations. (State's Ex. 4). The deputies found the appellee, a black male, operating the vehicle. (State's Ex. 4). The appellee consented to a search of the vehicle, and a Samsung Galaxy5 phone was recovered. (State's Ex. 4). The appellee identified the telephone number for the device. (State's Ex. 4).

Parker also detailed her knowledge, based on her training and experience, about cellular "smart" phones. (State's Ex. 4). These phones may contain electronic data such as incoming and outgoing telephone calls and text messages, emails, video recordings, photographs, voicemail messages, and identifying information. (State's Ex. 4). Additionally, a search of a cellular "smart" phone will reveal its telephone number and the service provider for the device. (State's Ex. 4). This information enables law enforcement to obtain geo-location information, which may show the approximate location of a suspect at or near the time of the offense. (State's Ex. 4).

Again based on her training and experience, Parker also relayed her knowledge about the usage of these phones by suspects who have committed a murder. (State's Ex. 4). She stated that "it is common for suspects to communicate about their plans via text messaging, phone calls, or through other communication applications." (State's Ex. 4). Likewise, she stated that these suspects often make

phone calls or send text messages just before and after a crime and use the internet through their phones to search for information in a moment of panic or to cover up the offense. (State's Ex. 4).

The day after the phone was seized, Judge Brad Hart of the 230th District Court of Harris County, Texas, found that Parker's affidavit was sufficient to establish probable cause for the issuance of a search warrant for the contents of the Samsung Galaxy5 phone. (State's Ex. 4). Hart issued the warrant and ordered the forensic examination of the device. (State's Ex. 4).

More than two years later, the appellee moved to suppress (1) any evidence obtained from the traffic stop and the appellee's arrest, (2) all of the appellee's oral and written statements, and (3) any testimony about that evidence and those statements. (C.R. – 66–73). The appellee alleged that law enforcement conducted a pretextual traffic stop and that the officers lacked probable cause to conduct the stop and to search the vehicle. (C.R. 67–70). After a hearing on the appellee's motion, the trial court—presided over at that time by Judge Denise Collins—made the following pertinent findings:

- the traffic stop was "legitimate albeit pretexual;"
- the traffic stop was lawful;
- law enforcement did not seize the phone from the vehicle until the appellee consented to a search of the vehicle;

- because law enforcement lawfully detained the appellee and he consented to a search of the vehicle, law enforcement lawfully obtained the phone;
- the affidavit was insufficient to create probable cause that the phone in the vehicle with the appellee would contain evidence of a capital murder.

(I R.R. – 194; II R.R. – 4–18).

Judge Collins orally granted the appellee's motion to suppress any evidence seized from the phone. (II R.R. – 18). Judge Greg Glass later signed a written order granting the appellee's motion to suppress in its entirety, but clarified his intent after the court of appeals abated the case, ratifying the earlier ruling of Judge Collins. (C.R. – 96); (Supp. C.R. – 3).

GROUNDS FOR REVIEW

I. The court of appeals departed from the proper standard of review by substituting its own judgment for that of the magistrate who viewed the warrant affidavit and found probable cause.

II. The court of appeals employed a heightened standard for probable cause, departing from the flexible standard required by law.

ARGUMENT

The analysis used by the court of appeals in this case so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. TEX. R. APP. P. 66.3. Specifically, the court of

appeals employed the incorrect standard of review with regard to the magistrate's prior finding of probable cause to issue a warrant, and, having usurped the place of the magistrate, the court of appeals departed from the well-established flexibility of the standard for probable cause. This Court should therefore reverse the decision by the court of appeals.

The court of appeals departed from the proper standard of review by refusing to defer to the magistrate's finding of probable cause and by departing from the well-established, flexible standard for probable cause.[4]

A magistrate's issuance of a search warrant is an implicit finding of probable cause. TEX. CODE CRIM. PROC. art. 18.0215(c)(5)(B). And courts must give great deference to a magistrate's implicit finding of probable cause when reviewing the decision to issue a warrant. *State v. McLain*, 337 S.W.3d 268, 271-72 (Tex. Crim. App. 2011). Appellate review of an affidavit in support of a search warrant is not *de novo*. *State v. Dugas*, 296 S.W.3d 112, 115 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd). Rather, reviewing courts apply a highly deferential standard of review because of the constitutional preference for searches conducted pursuant to a warrant. *McLain*, 337 S.W.3d at 271.

As long as the magistrate had a substantial basis for concluding that probable cause existed, a reviewing court must uphold the magistrate's probable-

[4] Because the State's grounds for review are interrelated, the State addresses them simultaneously.

cause determination. *McLain*, 337 S.W.3d at 271. A reviewing court may not analyze the affidavit in a hyper-technical manner. *Id*. (citing *Illinois v. Gates*, 462 U.S. 213, 236 (1983)). Instead, it must interpret the affidavit in a commonsensical and realistic manner, recognizing that the magistrate may draw reasonable inferences. *Id*.

Probable cause exists when, under the totality of the circumstances, there is a fair probability or substantial chance that contraband or evidence of a crime will be found at the specified location. *McLain*, 337 S.W.3d at 272. This is a "flexible and non-demanding" standard. *Id.*; *accord Rodriguez v. State*, 232 S.W.3d 55, 60 (Tex. Crim. App. 2007). Neither federal nor Texas law defines precisely what degree of probability suffices to establish probable cause. *Rodriguez*, 232 S.W.3d at 61. "Almost certainly, for example, fair probability does not require information that would persuade a reasonable person that the matter is more likely than not." *Id.* at 60 n.21 (internal references omitted).

Probable cause must be found within the four corners of the affidavit supporting the search warrant. *McLain*, 337 S.W.3d at 271. Probability cannot be based on mere conclusory statements of an affiant's belief. *Rodriguez*, 232 S.W.3d at 61. That said, "the training, knowledge, and experience of law enforcement officials is taken into consideration." *Wiede v. State*, 214 S.W.3d 17, 25 (Tex. Crim. App. 2007). Reviewing courts thus allow officers "to draw on their own

experience and specialized training to make inferences from and deductions about the cumulative information available to them 'that might elude an untrained person.'" *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal references omitted).

"The inquiry for reviewing courts, including the trial court, is whether there are sufficient facts, coupled with inferences from those facts, to establish a 'fair probability' that evidence of a particular crime will likely be found at a given location." *Rodriguez*, 232 S.W.3d at 62. "The issue is not whether there are other facts that could have, or even should have, been included in the affidavit; [a reviewing court] focus[es] on the combined logical force of facts that *are* in the affidavit, not those that are omitted from the affidavit." *Id.* (emphasis in original).

The dissenting justice in this case provided a thorough overview of the facts and applicable law, demonstrating that the at-issue affidavit laid out the nexus between the sedan and the capital murder; the affidavit also established a fair probability that evidence of the capital murder would be found in the cellphone. *Baldwin*, ___ S.W.3d ___ at *9-13. While the majority opinion took issue with the failure of two witnesses to record the license plate number and external accessories of the sedan, the law does not demand such specific details to establish probable cause.

As the dissent noted, "the majority has demanded such a high quantum of proof that nothing less than a hard certainty will suffice. That is plainly not the law." *Id*. at *10 (citing *State v. Elrod*, 538 S.W.3d 551, 557 (Tex. Crim. App. 2017) ("The process of determining probable cause does not deal with hard certainties, but with probabilities.")). The court of appeals demanded additional facts, but they ignored existing ones; the majority failed to acknowledge facts about the neighborhood and the sedan that illustrated the unlikelihood that the vehicle observed and described by multiple witnesses was anything other than the same sedan. *See Id*. A logical and commonsense reading of the affidavit—the type of reading supported by Texas law—supports the magistrate's finding of probable cause. The majority should have deferred to the magistrate, not supplanted the magistrate. *See Bonds v. State*, 403 S.W.3d 867, 873 (Tex. Crim. App. 2013) ("When in doubt, the appellate court should defer to all reasonable inferences that the magistrate could have made.").

The majority noted that the affidavit contained no particularized evidence connecting the appellee's cellphone to the capital murder. Specifically, the affidavit included a number of statements about the use of cellphones generally, which were based on the affiant's training and experiences. But, as the dissent noted, one statement was pertinent to the magistrate's determination of probable cause. *Baldwin*, ___ S.W.3d ___ at *11. The affiant noted that "[i]t is common for

suspects to communicate about their plans via text messaging, phone calls, or through other communication applications." *Id*.

The affiant's statement is pertinent because "[t]he magistrate could have reasonably concluded" that the capital murder here, which was committed by "two men acting in concert who prepared for the offense over the course of two days," was a "joint activity" that "required a certain level of coordination and communication, the evidence of which might be discovered on a cellphone." *Baldwin*, ___ S.W.3d ___ at *11 (referencing *Foreman v. State*, ___ S.W.3d ___, 2020 WL 6930819, at *4-5 (Tex. Crim. App. 2020) (concluding that a magistrate could reasonably infer that an auto shop was equipped with a video surveillance system because there were other facts in the affidavit showing that the auto shop had a heightened need for security)).

The Fourteenth Court of Appeals has employed comparable reasoning in another recent case. *See Diaz v. State*, 604 S.W.3d 595, 604 (Tex. App.—Houston [14th Dist.] 2020, pet. granted) ("The affidavit stated that two men were involved in the home invasion and that police recovered several parts of one or more cell phones at the scene. From this, the magistrate reasonably could infer that the perpetrators possessed or utilized one or more cell phones before or during the

planning or commission of the offense and that any recovered cellphones could have evidence of the offense.").[5]

Here, based on all of the facts in the affidavit, the magistrate had a substantial basis for believing that a search of the appellee's cellphone would probably produce evidence of preparation, which would also include evidence of the identity of the other person who participated in the capital murder. The affidavit in this case contained sufficient facts to support the magistrate's implied finding of probable cause. Because the dissent in this case, and not the majority, reached the conclusion in line with Texas law and precedent, and because the majority usurped the role of the magistrate and heightened the requirements to establish probable cause, this Court should reverse the judgment of the court of appeals and rule in accordance with the dissenting opinion.

[5] This Court in *Diaz* granted the petition for discretionary review in the case only as to an issue regarding a confidential informant.

PRAYER FOR RELIEF

It is respectfully requested that the decision by the majority of the court of appeals be reversed and that this Court rule in accordance with the court's dissenting opinion.

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